91-41

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIGUEL A. GARGALLO, Petitioner,

v.

TECLA GARGALLO, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

MIGUEL A. GARGALLO
730 Riverview Dr., 4B
Columbus, Ohio 43202
(614) 268-2349
Petitioner, Pro Se

QUESTIONS PRESENTED

1. Is a retired judge *per se* vested with authority to render a court judgment?

2. Can a judgment, entered without jurisdiction, be given *res judicata* effect on a later judgment?

3. Can a judgment, entered in violation of the doctrines of *res judicata* and direct estoppel, be given *res judicata* effect on a later judgment?

4. Does the trial court have authority to modify, *sua sponte*, the real estate property rights of the parties, by amending substantially a judgment that had finally settled those rights, on appeal to a court of last resort, many years before?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWING THE WRIT 8

CONCLUSION 10

APPENDIX A-1

Appellate court judgment, Jan. 24, 1973 A-1

Trial court judgment, May 30, 1975 .... A-2

Appellate court judgment, Nov. 26, 1975 A-5

Trial court entry, Aug. 6, 1976 ..... A-7

Trial court judgment, Dec. 27, 1984 .... A-9

Trial court Stipulation, March 2, 1988 .. A-12

Appellate court judgment, Aug. 19, 1985 A-14

TABLE OF CONTENTS (Contd.)

APPENDIX (Contd.)

Ohio Supreme Court entry, Dec. 11, 1985 A-15

Trial court judgment, Feb. 24, 1989 ... A-16

Appellate court opinion, July 12, 1990 .. A-18

Appellate court judgment, July 12, 1990 . A-30

Appellate court decision, Aug. 30, 1990 . A-32

Appellate court entry, Aug. 30, 1990 ... A-35

Ohio Supreme Court entry, Jan. 30, 1991 A-36

TABLE OF AUTHORITIES

CASES:

Fox v. Fox, 441 P.2d 678 (1968) 9

Gargallo v. Gargallo, 419 U.S. 1065 (1974) 4, 10

Gargallo v. Gargallo, 434 U.S. 955 (1977) 6, 10

State v. Dowdel, 464 A.2d 1089 (Md.App. 1983) 9

Twining v. New Jersey, 211 U.S. 78, 110-111 (1908) 9

Wolve v. Wolve, 46 Ohio St.2d 399 (1976) 10

MISCELLANEOUS:

63 Ohio Jur. 3d, Judgments, Sections 441 and 454 (1985 & Supp. 1990) 9

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIGUEL A. GARGALLO, Petitioner

v.

TECLA GARGALLO, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, MIGUEL A. GARGALLO, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Ohio, entered in the above-entitled cause on January 30, 1991.

I. OPINIONS BELOW

The final orders of the Supreme Court of Ohio, no opinions having been rendered, and the

judgments and opinions of the Court of Appeals of Franklin County, Ohio, and the Court of Common Pleas of Franklin County, Ohio, Division of Domestic Relations, not reported as of to date, are reproduced in the Appendix.

II. JURISDICTION

The pertinent final order of the Supreme Court of Ohio was entered on January 30, 1991. On April 23, 1991, the Honorable John Paul Stevens, Associate Justice, signed an order (No. A-796) extending the time for filing this petition for writ of certiorari to and including July 1, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

III. CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Contitution:

> "No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV. STATEMENT OF THE CASE

Summary. This petition for a writ of certiorari concerns an order rendered and filed by the trial court, on December 27, 1984, without notice to Petitioner, that had been approved by counsel for Respondent and signed by a former judge, of the County of Logan, who had retired many years before and who was not recalled from retirement to hear the matter. In addition, said order does not show, on its face, that said former judge was assigned to the case. The order of December 27, 1984, modified substantially a former final order, entered more than twelve (12) year before, concerning the real estate property of the parties.

Discussion. A more detailed analysis of the facts shows that a trial court judgment was affirmed, in its entirety, by the appellate court, on January 24, 1973, under Case No. 72AP-248. (A-1). The trial court judgment, filed on August 14, 1972, made no division of the real estate property acquired by Petitioner before and during the marriage. Then, an appeal, as of right, from the order of January 24, 1973, to the Supreme Court of Ohio -- the state court of last resort -- was dismissed on April 19, 1974, under Case No. 74-113. And a petition for writ of certiorari, in this Court, was denied on December 16, 1974, under Case No. 74-5376. Gargallo v. Gargallo, 419 U.S. 1065 (1974).

Despite the finality and the res judicata effect of said trial court judgment, the trial court modified it substantially, without notice

to Petitioner, awarding all the real estate property, in question, the the Respondent, by "Judgment Entry" filed on May 30, 1975, and made it nunc pro tunc as of August 14, 1972. (A-2, 3, 4). On appeal, this modified judgment of May 30, 1975, was reversed and remanded by the appellate court "Journal Entry of Judgment" filed, under Case No. 75AP-322, on November 26, 1975. (A-5, 6). The reversal of the May 30, 1975, judgment was based, inter alia, on the fact that the judgment of August 14, 1972, had been appealed and affirmed by the appellate court.

Then, on August 6, 1976, the trial court filed an "Entry" stating that this divorce cause had been "diligently prosecuted"; and that pursuant to the mandate of the appellate court, it had vacated the "nunc pro tunc entry" of May 30, 1975; and that this vacatur "leaves in effect the previous

judgment entry of divorce" of August 14, 1972. (A-7, 8). On appeal, the "Entry" of August 6, 1976, remained undisturbed by the appellate court "Journal Entry" under Case No. 76AP-777, filed on December 9, 1976, and the subsequent Supreme Court of Ohio order of dismissal under Case No. 77-146, filed on April 29, 1977. Thereafter, a petition for a writ of certiorari, filed in this matter, was denied by this Court under Case No. 77-460, on November 14, 1977. Gargallo v. Gargallo, 434 U.S. 955 (1977).

Finally, on December 27, 1984, the trial court re-filed the "Judgment Entry" of May 30, 1975, supra (A-2, 3, 4), but under the title (and guise) of "Nunc Pro Tunc Judgment Decree of Divorce." (A-9, 10, 11). This last judgment was rendered and filed without notice to Petitioner, and was signed by a former judge of Logan County,

Ohio, known as Richard H. Finefrock, who had retired, from the bench, many years before, and was not recalled from retirement to hear the matter. Further, the judgment does not show, on its face, that Mr. Finefrock was assigned to the case. In addition, a "Stipulation", made between the counsels for the two parties and filed on March 2, 1988, states that the records show no appointment of Judge Finefrock to the trial court "for the period of November 1, 1983 to date (March 2, 1988)"; and that "(i)n December 1984, Judge Finefrock was no longer an elected Judge, but was on retired status." (A-12, 13). Although entered without jurisdiction, the trial court judgment of December 27, 1984, was affirmed by the appellate court, on August 19, 1985, under Case No. 85AP-62. (A-14). Then an appeal to the Supreme Court of Ohio was dismissed on December 11, 1985, under

Case No. 85-1620. (A-15). A further attempt, by Petitioner, to vacate the void judgment of December 27, 1984, was overruled by the trial court, on February 24, 1989. (A-16, 17). Then, on appeal, this order was affirmed by the appellate "Opinion" (A-18 through 29) and "Journal Entry of Judgment" (A-30, 31), filed on July 12, 1990, under Case No. 89AP-373. The appellate court also filed a "Memorandum Decision" (A-32, 33, 34) and a "Journal Entry" (A-35), on August 30, 1990. Thereafter, the Supreme Court of Ohio dismissed an appeal, on January 30, 1991, under Case No. 90-1762. (A-36). It is from this last final order that Petitioner seeks a writ of certiorari to the Supreme Court of Ohio.

V. REASONS FOR ALLOWING THE WRIT

The decisions below involve a constitutional question which has not been, but should be, settled

by this Court.

1. The petition should be allowed, because a retired judge, per se, is not vested with authority to render a court judgment. This question of constitutional dimension appears to be of first impression in this Court.

State v. Dowdel, 464 A.2d 1089 (Md.App. 1983); and Fox v. Fox, 441 P.2d 678 (1968).

2. The writ should also issue, because the judgment of December 27, 1984, entered without jurisdiction, violates the Fourteenth Amendment to the Constitution, and cannot hold and exert res judicata effect on a subsequent judgment.

Twining v. New Jersey, 211 U.S. 78, 110 -111 (1908); and 63 Ohio Jur.3d, Judgments, Sections 441 and 454 (1985 & Supp. 1990).

3. Additionally, the judgment of December 27, 1984, violated (1) the res judicata effect of the

appellate court judgment of January 24, 1973, and the trial court judgment of August 6, 1976, which remained undisturbed on appeals to the state court of last resort and on petitions to this Court for writs of certiorari; and (2) the direct estoppel effect of the appellate court judgment of November 26, 1975, which was not appealed.

Gargallo v. Gargallo, 419 U.S. 1065 (1974) and 434 U.S. 955 (1977).

4. Besides, the property rights of the parties, once settled, should remain undisturbed.

Wolfe v. Wolfe (1976), 46 Ohio St.2d 399.

VI. CONCLUSION

Therefore, the writ should be allowed.

Respectfully submitted,

MIGUEL A. GARGALLO
730 Riverview Dr., 4B
Columbus, Ohio 43202
(614) 268-2349
Petitioner, Pro Se

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
Jan. 24, 1973

v.

No. 72AP-248

Miguel A. Gargallo,

Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court, rendered herein on January 9, 1973, all seven assignments of error are overruled, and it is the judgment and order of this court that the judgments of the Common Pleas Court, Division of Domestic Relations, of Franklin County, Ohio, are affirmed.

/s/ Dean Strausbaugh, Judge

/s/ Robert E. Holmes, Judge

/s/ Alba L. Whiteside, Judge

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO,
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo

Plaintiff

Filed:
May 30, 1975

vs

No. 136,865

Miguel A. Gargallo

Defendant

JUDGMENT ENTRY

This day, the Court's attention being called to the fact that the nunc pro tunc judgment decree of divorce recorded herein on the 14th day of August, 1972, failed to recite that the Court had awarded the real estate of the parties to this action to the plaintiff, and it appearing that the Court on said former date did actually render a decision granting the plaintiff a divorce and awarding the real estate to her, but by the inadvertance that part of the Court decision in re-

spect to such real estate was omitted from the former entry, it is

ORDERED that the defendant transfer to the plaintiff, by good and sufficient deed, all of his right, title and interest in and to the real estate of the parties hereto located at 1127 Shady Hill Drive, Columbus, Ohio, and being more particularly described as follows:

> "Situated in the County of Franklin, in the State of Ohio, and in the city of Columbus, and bounded and describes as follows:
>
> Being Lot Number Twenty-nine (29) in SHADY HILL ESTATES, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 28, page 27, Recorder's Office, Franklin County, Ohio."

It is further ORDERED that the plaintiff shall pay the mortgage indebtedness on said real estate, holding the defendant harmless thereon.

It is further ORDERED that upon the failure of the defendant to execute said conveyance within

five (5) days from the effective day hereof, then said judgment entry shall operate as such conveyance and in that case.

The Clerk is now directed to enter this order on the journal nunc pro tunc as of August 14, 1972, and the same shall be effective from and as of such date.

/s/ Clayton W. Rose, Jr., Judge

Approved:

TYACK, SCOTT & COLLEY

By

/s/ Paul Scott
Attorneys for Plaintiff

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
Nov. 26, 1975

v.

No. 75AP-322

Miguel A. Gargallo,

Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this Court rendered herein on November 20, 1975, assignments of error numbers three, four and six are sustained and the remaining assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the Common Pleas Court, Division of Domestic Relations, is reversed, and this cause is remanded to that court for further proceedings in accordance with law and said decision.

/s/ Dean Strausbaugh, Judge

/s/ Alba L. Whiteside, Judge

/s/ John W. McCormac, Judge

Approved:

TYACK, SCOTT & COLLEY

By

/s/ PAUL SCOTT
Attorney for Plaintiff

/s/ MIGUEL A. GARGALLO
Appellant, In Propria Persona

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO,
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo,

Plaintiff,

Filed:
Aug. 6. 1976

-vs-

No. 136,865

Miguel A. Gargallo,

Defendant.

ENTRY

This day this cause came on to be heard on the motion of the defendant. The Court, being fully advised in the matter, after considering the motion and memorandum of the defendant, finds that the motion is not well taken and overrules the same.

This cause has been diligently prosecuted; the case was completed and a judgment entry of divorce was entered after a previous appeal had been taken to a previous judgment entry of divorce; an appeal was also perfected from the later judg-

an appeal was also perfected from the later judgment entry of divorce and the court was affirmed; subsequent to that a nunc pro tunc entry was erroneously entered by this Court in an attempt to correct and spell out the legal description of the real estate; and an appeal was taken from that entry and this Court was reversed. Pursuant to the mandate of that appellate decision an entry was filed vacating the nunc pro tunc entry which leaves in effect the previous judgment entry of divorce.

/s/ Clayton W. Rose, Jr., JUDGE

cc: Tecla Gargallo Beck
Plaintiff

Miguel A. Gargallo
Defendant

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO,
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo

Plaintiff

Filed:
Dec. 27, 1984

vs

No. 136,865

Miguel A. Gargallo

Defendant

NUNC PRO TUNC JUDGMENT
DECREE OF DIVORCE

This day, the Court's attention being called to the fact that the nunc pro tunc judgment decree of divorce recorded herein on the 14th day of August, 1972, failed to recite that the Court had awarded the real estate of the parties to this action to the plaintiff, and it appearing that the Court on said former date did actually render a decision granting the plaintiff a divorce and awarding the real estate to her, but by the inadvertance that part of the Court decision in re-

spect to such real estate was omitted from the former entry, it is

ORDERED that defendant transfer to the plaintiff, by good and sufficient deed, all of his right, title and interest in and to the real estate of the parties hereto located at 1127 Shady Hill Drive, Columbus, Ohio, and been more particularly described as follows:

> "Situated in the County of Franklin, in the State of Ohio, and in the city of Columbus, and bounded and described as follows:
>
> Being Lot Number Twenty-nine (29) in SHADY HILL ESTATES, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 28, page 27, Recorder's Office, Franklin County, Ohio."

It is further ORDERED that the plaintiff shall pay the mortgage indebtedness of said real estate, holding the defendant harmless thereon.

It is further ORDERED that upon the failure of the defendant to execute said conveyance within

five (5) days from the effective day hereof, then said judgment entry shall operate as such conveyance and in that case.

The Clerk is now directed to enter this order on the journal nunc pro tunc as of August 14, 1972, and the same shall be effective from and as of such date.

/s/ Richard H. Finefrock, Judge

Approved:

/s/ Paul Scott
Attorney for Plaintiff

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo,

Plaintiff,

Filed:
March 2, 1988

v.

No. 136,865

Miguel A. Gargallo,

Defendant.

STIPULATION

It is stipulated by and between counsel and the defendant that the Clerk of the Ohio Supreme Court would testify that:

1. The records of the Ohio Supreme Court are in such conditions that the Clerk was unable to search or locate an assignment of Judge Fine-frock to the Court of Common Pleas, Franklin County, Ohio, Division of Domestic Relations from 1972 to November 1, 1983.

2. The records of the Supreme Court of

Ohio for the period of November 1, 1983 to date fail to reveal an appointment of Judge Finefrock to the Court of Common Pleas, Division of Domestic Relations, for that period of time, and

3. In December of 1984, Judge Finefrock was no longer an elected Judge, but was on retired status.

/s/ Paul Scott
Attorney for Plaintiff

/s/ Richard F. Swope
Attorney for Defendant

/s/ Miguel A. Gargallo
Defendant

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
Aug. 19, 1985

v.

No. 85AP-62
(Regular Calendar)

Miguel A. Gargallo,

Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 15, 1985, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

STRAUSBAUGH, NORRIS & STERN, JJ.

By:
/s/ Dean Strausbaugh, Judge

STERN, J., Retired, of the Supreme Court of Ohio, assigned to active duty pursuant to Section 6(C), Article IV, Constitution

THE SUPREME COURT OF OHIO

Tecla Gargallo, 1985 TERM

Appellee, To wit: Dec. 11, 1985

v. No. 85-1620

Miguel A. Gargallo, ENTRY

Appellant.

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitution question exists therein.

COSTS:

Motion Fee, $20.00, paid by Richard Swope.

/s/ Frank D. Celebrezze
Chief Justice

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo,

Plaintiff

Filed:
Feb. 24, 1989

-vs-

No. 136,865

Miguel A. Gargallo,

Defendant.

DECISION AND JUDGMENT ENTRY

This matter comes before the Court upon defendant's Miguel A. Gargallo, Motion for Relief from Judgment and Motion to Modify Decision. The Court, after reviewing the record, overrules the defendant's motions.

The party seeking relief from judgment bears the burden of proving those facts which would convince the Court to give relief from judgment. In the present case, the defendant has not carried the burden of proof and therefore his

motion is overruled.

The doctrine of res judicata serves the vital public interest by assuring that all litigation has a reasonable ending point and by preventing a party from having to contest the same issue or cause more than once. La Barbera v. Batsch (1967) Ohio St 2d 106.

In the present case, the issues have been extensively litigated in both the trial and appellate courts. This Court is not persuaded to reopen this case and feels further litigations is frivolous and unnecessary.

/s/ Charles R. Petree, Judge

cc: Richard F. Swope
Attorney at Law
6810 E. Main Street
Reynoldsburg, Ohio 43068

Paul Scott
Attorney at Law
536 South High Street
Columbus, Ohio 43215

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
July 12, 1990

v.

No. 89AP-373
(Regular Calendar)

Miguel A. Gargallo,

Defendant-Appellant.

OPINION

Rendered on July 12, 1990

PAUL SCOTT CO., L.P.A.
and MR. PAUL SCOTT, for appellee

MR. MIGUEL A. GARGALLO, pro se

APPEAL from the Franklin County
Court of Common Pleas,
Division of Domestic Relations

YOUNG, J.

This is an appeal by appellant, Miguel A. Gargallo, from a February 24, 1989 decision and judgment entry overruling appellant's "Motion for Relief from Judgment Pursuant to Rule 60(B),

Ohio Rules of Civil Procedure."

The voluminous record indicates that this action began in 1968, when appellant's former wife filed for a divorce. Following a hearing, Judge Rose granted a divorce to the wife on June 13, 1969. The marital residence was awarded to the wife. On December 30, 1969, Judge Marshall sustained appellant's oral motion to vacate the decree of divorce filed June 13, 1969, and ordered the case to be set for trial on the merits before Judge Marshall. An appeal was taken from that order in Gargallo v. Gargallo (Mar. 10, 1970), Franklin App. No. 9733, unreported (1970 Opinions 522), wherein this court dismissed appellant's appeal for the reason that Judge Marshall's order was based upon appellant's motion, which order was not final and appealable.

In the latter part of 1969, appellant filed

numerous pro se motions; included were affidavits of prejudice against all three judges of the division of domestic relations. On December 17, 1969, the Supreme Court filed an order finding that the judges of the division of domestic relations were not prejudiced but excused them from further participation in the cause upon the request of the judges, and dismissed the affidavit of prejudice. Pursuant to this order, Judge Marshall entered his December 30, 1969 order.

On October 19, 1970, Judge Rose rendered separate findings of fact and conclusions of law. One minute later, the decree of June 13, 1969 was refiled by the clerk but not reexecuted by the judge. Appellant moved for relief from judgment, which was overruled by Judge Allen. Upon appeal, in Gargallo v. Gargallo (Nov. 9, 1971), Franklin App. No. 71-203, unreported (1971 Opinions 71),

Judge Whiteside detailed the complex filings and decisions by the various courts, and affirmed and reversed in part, the judgment; he remanded with instructions to expunge the October 19, 1970 filing, and directed the trial court to determine whether final judgment should be entered or a new trial commenced.

On July 19, 1972, Judge Finefrock, assigned to the case, filed an entry incorporating the previous findings of Judge Rose. On Appeal, this court affirmed the order of July 19, 1972, but found that no final judgment had been entered in the case. On July 6, 1972, a judgment decree of divorce, signed by Judge Finefrock was filed, but later corrected by a nunc pro tunc judgment decree of divorce signed by Judge Finefrock and dated August 14, 1972. In yet another appeal, the case of Gargallo v. Gargallo (Jan. 9, 1973),

Franklin App. No. 72AP-248, unreported (1973 Opinions 21), affirmed the judgment of the trial court and found that the trial court ordered "*** that the divorce should be granted and the division of property, custody and child support should be as originally ordered by Judge Rose." Id. at 26.

The record further indicates that in a May 30, 1975 judgment entry, the trial court stated:

> "*** (T)he nunc pro tunc judgment decree of divorce recorded herein on the 14th day of August, 1972, failed to recite that the Court had awarded the real estate of the parties to this action to the plaintiff, and it appearing that the Court on said former date did actually render a decision granting the plaintiff a divorce and awarding the real estate to her, but by inadvertance (sic) that part of the Court decision in respect to such real estate was omitted from the former entry, it is
>
> "ORDERED that defendant transfer to the plaintiff, by good and sufficient deed, all of his right, title and interest in and to the real estate of the parties hereto located at 1127 Shady Hill Drive, Columbus, Ohio, being more particularly described as follows ***."

Thereafter, on appeal, this court found in Gargallo v. Gargallo (Nov. 20, 1975), Franklin App. No. 75AP-322, unreported (1975 Opinions 2844), pursuant to App. R. 18(C), that:

> "***(M)istakes in judgments by a court may be corrected by the same judge which entered the original judgment, but not by a different judge unless there is a showing in the record that the judge before whom the action has been tried is unable to perform the duties to be performed as provided in Civ. R. 63(B). In this case there is no showing in the record that Judge Finefrock is, or was, unable to perform his duties, and, therefore, it was error on the part of the Common Pleas Court to attempt to correct a judgment entered by another judge unless there is a showing as provided for in Civ. R. 63(B)."

This court further stated that, due to the nature of a nunc pro tunc entry, it is necessary for the judgment to be supported by an evidentiary hearing, although care must be taken by the court to ensure that no rights of the parties are violated. This court reversed and remanded the cause to the common pleas court. Nothing further appears to

have occurred until May 1984, when appellant sought to partition the property and recover his claimed interest from his former wife as a result of the sale of the property. The trial court, in the December 27, 1989 (sic) nunc pro tunc judgment decree of divorce, filed an entry conveying appellant's interest to his former wife.

Appellant filed an appeal from the December 27, 1984 nunc pro tunc judgment entry. This court, in Gargallo v. Gargallo (Aug. 15, 1985), Franklin App. No. 85AP-62, unreported (1985 Opinions 2346), overruled all eleven assignments of error asserted by appellant and affirmed the trial court's judgment. Thereafter, on December 26, 1985, appellant filed a "Motion for Relief from Judgment Pursuant to Rule 60(B), Ohio Rules of Civil Procedure." After the trial the court overruled this motion, appellant asserted a timely

appeal and now asserts the following five assignments of error:

"1. The trial court committed prejudicial error in failing to file its Findings of Fact and Conclusions of Law, which were timely requested by Defendant-Appellant, pursuanto to Rule 52, Ohio Rules of Civil Procedure.

"2. The trial court committed prejudicial error in failing to file its Answers to written Interrogatories which were submitted simultaneously with his timely requests for Finfings of Fact and Conclusions of Law.

"3. The trial court committed prejudicial error in failing to vacate the post-judgment Nunc Pro Tunc Judgment Decree of Divorce of December 27, 1984, because on this date the court lacked jurisdiction or power to act in a manner not authorized by the Ohio Rules of Civil Procedure, and because said modified Judgment Decree was contrary to the applicable Findings of Fact and Conclusions of Law.

"4. The trial court committed prejudicial error in failing to vacate the post-judgment Nunc Pro Tunc Judgment Decree of Divorce of December 27, 1984, because former Judge Finefrock, who signed the entry, was not recalled or assigned to the case.

"5. The trial court committed prejudicial error in failing to vacate the post-judgment Nunc Pro Tunc Judgment Decree of Divorce of December

27, 1984, which deprived Defendant-Appellant of his interest in real estate, after this matter had been finally settled by the trial court's Judgment of July 6, 1972, and its subsequent affirmance, in its entirety, by the Court of Appeals of Franklin County, Ohio, on January 24, 1973, under Case No. 72AP-248."

Appellant is litigating his appeal pro se and thus, it is important to note that pro se litigants are bound by the same rules and procedures as litigants with counsel. Consequently, appellant should not be accorded any greater rights. Dawson v. Pauline Homes, Inc. (1958), 107 Ohio App. 90.

The only issue properly before this court is whether the trial court abused its discretion in overruling appellant's Civ. R. 60(B)(4) and (5) motion for relief from judgment. Since appellant's five assignments of error assert substantive arguments based upon the merits of the matter referred to herein, they are improperly before this

court.

Civ.R. 60(B) provides, in pertinent part:

> "*** Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as just, the court may relieve a party or his representative from a final jugment, order or proceeding for the following reasons: *** (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

The February 24, 1989 decision and judgment entry states that appellant had not met his burden of proof of proving those facts which would convince the court to grant relief from judgment. The trial court also noted in its decision that the arguments asserted by appellant had been litigated extensively in the trial and appellate courts and

were barred from further litigation by the doctrine of res judicata.

Upon careful review of the voluminous records in this case, this court agrees with the trial court's ruling that appellant has failed to meet his burden of proof in providing facts which would warrant relief from judgment pursuant to Civ. R. 60(B)(4) and (5). The arguments asserted by the appellant have all been previously litigated and are barred from further litigation by the doctrine of res judicata. The December 27, 1984 nunc pro tunc judgment entry merely reflects previous judicial decisions which were made throughout this case. The December 27, 1984 nunc pro tunc judgment entry was held to be valid in Gargallo v. Gargallo (Aug. 15, 1985), Franklin App. No. 85AP-62, unreported (1985 Opinions 2346). Thus, since this judgment entry was previously held to

be valid by this court, it is the law of the case and is not to be further reviewed.

In determining that the trial court properly overruled appellant's Civ. R. 60(B) motion, this court necessarily overrules all five assignments of error asserted by appellant since they are improperly before this court. Accordingly, appellant's first, second, third, fourth and fifth assignments of error are not well-taken and are overruled. Appellant's March 20, 1990 "Motion" filed with this court is overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

BOWMAN and KOEHLER, JJ., concur.

KOEHLER, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
July 12, 1990

v.

No. 89AP-373
(Regular Calendar)

Miguel A. Gargallo,

Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on July 12, 1990, appellant's March 20, 1990 "Motion" is overruled, and the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

BOWMAN, YOUNG & KOEHLER, JJ.

By:
/s/ John C. Young, Judge

KOEHLER, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

cc: Paul Scott
Miguel A. Gargallo

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
August 30, 1990

v.

No. 89AP-373
(Regular Calendar)

Miguel A. Gargallo,

Defendant-Appellant.

MEMORANDUM DECISION

Rendered on August 30, 1990

PAUL SCOTT CO., L.P.A.
and MR. PAUL SCOTT, for appellee

MR. MIGUEL A. GARGALLO, pro se

ON MOTION FOR RECONSIDERATION

YOUNG, J.

Appellant moves this court, pursuant to App.R. 26, to reconsider our decision rendered July 12, 1990, which affirmed the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations. That court had overruled

appellant's Civ. R. 60(B) motion.

Generally, an appellate court will not reconsider a previous decision unless the motion calls to the attention of the court an obvious error in the prior decision or raises an issue that was either not considered at all or was not fully considered. Matthews v. Matthews (1981), 5 Ohio App. 3d 140, 143. Here, the court fully considered and addressed the issues presented on appeal. This court specifically found that the trial court properly overruled appellant's Civ. R. 60(B) motion and this court overruled appellant's five assignments of error because they asserted substantive arguments based upon the merits of the matter and were not properly before the court.

Based on the foregoing, appellant's motion for reconsideration is denied.

Motion for reconsideration denied.

BOWMAN and KOEHLER, JJ., concur.

KOEHLER, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tecla Gargallo,

Plaintiff-Appellee,

Filed:
Aug. 30, 1990

v.

No. 89AP-373
(Regular Calendar)

Miguel A. Gargallo,

Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered on August 30, 1990 it is the order of this court that the motion for reconsideration is denied.

BOWMAN, YOUNG & KOEHLER, JJ.

By:
/s/ John C. Young, Judge

KOEHLER, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

cc: Paul Scott
Miguel A. Gargallo

THE SUPREME COURT OF OHIO

Tecla Gargallo, 1991 TERM

Appellee, To wit: Jan. 30, 1991

v. No. 90-1762

Miguel A. Gargallo, ENTRY

Appellant.

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitution question exists therein.

COSTS:

Motion Fee, $40.00, paid by Miguel A. Gargallo

(Court of Appeals No. 89AP-373)

/s/ Thomas J. Moyer
Chief Justice